United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-2126

To be argued by
JOSEPH W. HENNEBERRY

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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ERNEST WELCOME,

Petitioner-Appellant,

-against-

LEON J. VINCENT, Superintendent,
Green Haven Correctional Facility,

Respondent.

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BRIEF FOR RESPONDENT

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent
Office & P.O. Address
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-5168

JOSEPH W. HENNEBERRY
Assistant Attorney General
of Counsel

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BRIEF FOR RESPONDENT

Questions Presented

1. Whether the action of the trial court in refusing to permit appellant's counsel to question Albert Cunningham, a defense witness, concerning his admissions to participating in the crime that the defendant was charged with deprived appellant of his due process right to a fair trial?

2. Whether the recantation by prosecution witness Vincent Turner of his trial testimony violated appellant's due process right to a fair trial?

Preliminary Statement

In this habeas corpus proceeding, Ernest Welcome appeals from the decision of the United States District Court for the Southern District of New York (Weinfeld, J.) entered on September 2, 1976, dismissing appellant's application for a writ of habeas corpus. The District Court held that the trial judge's refusal to allow examination of Cunningham as to his alleged complicity in the homicide did not impair petitioner's defense to such an extent as to deny him a fundamentally fair trial. As to the second claim involving the alleged perjured testimony of witness Turner, the District Court held that the petitioner failed to show that there was a knowing use of perjured testimony by the prosecution which would constitute a denial of due process.

Statement of Facts

Appellant is incarcerated upon a judgment of the Supreme Court of the State of New York, Bronx County (Gellinoff, J.) entered on March 10, 1970, sentencing appellant to a term of imprisonment of from twenty-five years to life upon his conviction after

trial by jury on two counts of murder.

Evidence at Trial

The People's Case

On November 2, 1967 at approximately 3:40 or 3:45 p.m. several armed men entered the Katz Brothers Realty Office. The office was filled with numerous employees, several of whom testified at trial. The result of this incident was the murder of the two principals of that business, Hyman and Seymour Katz.

At approximately 3:40 p.m. a buzzer rang in the office. Janet Laccorn, one of the employees, went to the reception window to help the potential client. Upon arriving at the window, she saw a Black male wearing a hat and glasses. At that point, Hyman Katz came out, said "I'll handle it, Janet," and Ms. Laccorn returned to her desk. A second buzzer rang and Ms. Laccorn again walked to the window and as she looked through the reception window, she saw a man leaning against the door; she also saw that a third man was standing behind the first man, but did not see his face. At trial, Ms. Laccorn positively identified

the defendant Ernest Welcome as the man she saw leaning against the door. She recalled that he sported a greyish herringbone or tweed coat (Laccorn, 666-670, 680-698; Manson, 589-590).

Once at the window following the sounding of the second buzzer, Hyman Katz told Janet Laccorn that he would take care of the matter and again, she returned to her desk. A few minutes later, several of the employees heard Hyman Katz yelling to his brother Seymour for help. At this point Ms. Laccorn looked up, saw a man (whom she identified at trial as the defendant Charles Gale), poised on the sill of the reception window, on his way into the office proper, gun in hand. He was described by Ms. Laccorn as sporting a dark hat, dark jacket and glasses with dark rims. Ms. Laccorn immediately jumped up, started to walk towards the area of the encounter; she saw the intruder and Hyman Katz struggle to the floor. A fellow-employee, Mary Manson called to her, saying "Janet, get down here," and as Ms. Laccorn looked down, she saw Mary Manson under a desk. Before joining Ms. Manson under the desk, Ms. Laccorn looked back, only to see that a second man had entered the office;

he, too had a gun, but she did not get a good look at him before retreating to safety under a desk. Ms. Laccorn remained under the desk for a few minutes, during the course of that time, she heard four or five shots and some screaming; then . . . quiet. She left her hiding place, saw Seymour Katz bleeding on the floor and Hyman Katz staggering off into the other office (Laccorn, 667-674).

In connection with the investigation of this case, Ms. Laccorn was shown many pictures; she selected one picture, that of Charles Gale, sometime towards the end of November, 1967, and subsequently identified Gale in a lineup. Ms. Laccorn identified the defendant Ernest Welcome in a lineup at the end of November, or beginning of December, 1967 (Laccorn, 691-695, 707).

Other employees testified at trial identifying co-defendants Winston Holmes, and Charles Gale as participants in the crime.

On the day of the Katz murders, Dolores Marcell was employed by a firm whose offices were located directly below those of the Katz Brothers. At approximately 4:00 that afternoon, Ms. Marcell

heard screaming coming from the Katz Brothers office; she left her office, turned right to go towards the Katz Brothers office, when she walked into three men who were coming from the Katz Brothers building. To her left, another man stood and in response to her question about what had happened, he stated "Seymour got shot." Ms. Marcell turned to go back to her office, but as she was trying to get into her office, one of the men she had encountered previously said that he wanted to come into her office. She said "No," asked who he was, to which he replied that he was going upstairs to pay his rent. Ms. Marcell identified the defendant Ernest Welcome as one of the men she had bumped into on the afternoon of the murders. She stated that he was wearing a dark coat and hat on that grim afternoon. In connection with the investigation of this case, Ms. Marcell viewed six or seven lineups; out of all those lineups, she identified only one man - Ernest Welcome, and that identification occurred on December 12, 1967 (Marcell, 967-971, 972, 979-982).

The remainder of the case concerned the investigation of the crime by the police leading to the arrests of the defendants. In addition, the prosecution

called as a witness one Vincent Turner, a friend of the appellant, who testified that he had known the defendant Ernest Welcome for quite a few years. Turner admitted in open court that he was then awaiting sentence on five armed robbery charges on which he could receive sentences totalling 125 years in jail. He stated that no one in the District Attorney's office or in the Police Department had made any promises with respect to the testimony he was to give, but that he did expect some consideration for his testimony. Turner testified that on November 19 or 20, 1967, he saw the defendant Ernest Welcome in a pool-room on Eighth Avenue and 131st Street. The two spoke and Welcome asked the witness if he had heard about "that thing in the Bronx." When the witness replied "No, what are you talking about," Welcome said, "Them two studs I burnt." According to Turner, he then asked whether Welcome was referring to the "real estate thing" and Welcome said "Yeah" (Turner, 983-985, 988-990, 997-1001, 1004-1006).

The Defense

The gravamen of appellant's defense at trial was in the nature of alibi. Three witnesses testified that the appellant was at his mother's house on the

afternoon of November 2, 1967. The witnesses were his girl friend and two friends of his mother.

In addition, the appellant called as a witness one Albert Cunningham, a man who had been initially indicted for the Katz Brothers murders. At first Cunningham admitted that he was indicted and charged with the killing of the Katz Brothers. He then stated that he drove to the Bronx on November 2, 1967 with two individuals - one Branch and Thomas Green, with a shotgun and pistols and that he robbed the Katz Brothers. He then stated that he did not know if a shooting occurred during the course of the robbery (Cunningham, 1194-1224).

On cross-examination, Cunningham denied having anything to do with the Katz Brothers murders; he testified that he believed defense counsel was referring to his so-called confession during direct examination. He then stated that he was acquitted by a jury and knew nothing about the crimes (Cunningham, 1226-1228).

Cunningham had stated on direct testimony that he had had conversations with the Assistant

District Attorney and the detectives before his arrest for the Katz murders (Trial, 1194-95). When appellant's trial counsel tried to elicit what was said, the trial court sustained the prosecution's objection. The court indicated that it would permit counsel to question Cunningham as to any part he or anybody else played in the murders but not what Cunningham had told others. If, however, Cunningham turned out to be a hostile witness, the court indicated that it would permit such examination into inconsistent statements even if these statements were not in writing (Trial, 1216-18). Cunningham's oral answers to the Assistant District Attorney had been reduced to writing but were neither signed nor sworn to by him.

On redirect, after Cunningham retracted his direct testimony concerning participation in the crime, appellant's counsel again sought to question him concerning these oral statements, arguing that Cunningham's mention of the confession, which was not elicited by the prosecution, "opened to door" (Trial, 1229-30) to allow counsel to show that these statements were inconsistent with the answers given by the witness on cross-examination. The trial court refused

to permit this inquiry since Cunningham's testimony had not inculpated appellant or his co-defendants and since the oral statements were inadmissible hearsay.

Appellant was convicted after trial. The conviction was affirmed by the Appellate Division, First Department (39 App. Div. 2d 841). The direct appeal and the appeal of the denial of a motion for a new trial (based on Turner's recantation) was considered by the New York Court of Appeals on September 24, 1975 and the judgments were unanimously affirmed.

POINT I

APPELLANT WAS NOT DEPRIVED OF HIS DUE PROCESS RIGHT TO A FAIR TRIAL BY THE REFUSAL OF THE TRIAL JUDGE TO PERMIT APPELLANT'S COUNSEL TO QUESTION HIS OWN WITNESS CONCERNING AN ALLEGED CONFESSION TO THE SAME CRIME APPELLANT WAS CHARGED WITH.

Appellant's contention is that he was denied his Due Process rights because of the trial court's decision limiting examination of his witness, Albert Cunningham, as to what the appellant erroneously labels

Cunningham's confession. This contention is without merit. The court's limitation of cross-examination of a witness is a "state court's evidentiary ruling and not grounds for federal habeas relief." United States ex rel. Hardy v. McMann, 292 F. Supp. 191, 192 (S.D.N.Y., 1968). As in United States ex rel. Sadowy v. Fay, 284 F. 2d 426, 427 (2d Cir., 1969), "the trial court was merely applying a rule of evidence in accordance with its interpretation of New York law. This raises no federal question." See also Buchalter v. New York, 319 U.S. 427 (1943); United States ex rel. Holliday v. Adams, 443 F. 2d 7 (2d Cir., 1971); Schaefer v. Leone, 443 F. 2d 182 (2d Cir., 1971), cert. den. 404 U.S. 939; United States ex rel. Corby v. Conroy, 337 F. Supp. 517 (1971); United States ex rel. Santiago v. Follette, 298 F. Supp. 973 (S.D.N.Y., 1969); and United States ex rel. Birch v. Fay, 190 F. Supp. 105 (S.D.N.Y., 1961).

It is clear that the statement in question does not fit within the universally accepted definition of a confession. The appellant contends that questions regarding the confession should have been allowed because the Assistant District Attorney "opened the door." This contention is unsubstantiated by the record. The

appellant relies on Chambers v. Mississippi, 410 U.S. 284 (1973). The case at bar is clearly distinguished from Chambers. Chambers dealt with a written, sworn confession and three reliable oral confessions. The statement under consideration here has no such attributes. In addition, even if the Court ruled improperly in limiting examination of Cunningham, it would be harmless error, in that Cunningham's credibility had already been impeached by his own testimony.

Defense counsel clearly brought before the jury the allegations of Cunningham's participation in the Katz murders with two others who were not the defendants. It was also brought out that the charges were eventually dropped against Cunningham. Cunningham, himself, mentions the confession but on cross-examination denies participation in the crime. In light of the jury's rejection of appellant's alibi witnesses, the part that Cunningham played or could have played in appellant's defense is de minimus.

The appellant argues that questioning concerning Cunningham's statement would have been proper because:

1. The prosecution opened the door

during cross-examination of Cunningham by asking a question which resulted in Cunningham's mentioning of the confession;

2. Once Cunningham retracted his direct testimony, the appellant was entitled to impeach him despite the fact that the statement was not made under oath or subscribed in writing; and

3. The confession was a declaration against Cunningham's penal interest.

The case relied upon by the appellant to support his argument concerning the Cunningham statement was Chambers v. Mississippi (supra). The import of Chambers, however, is that upon the particular facts and circumstances of that case, the combined effects of all the trial court's rulings were to deny Chambers a fair trial in accord with the fundamental standards of due process. The rulings in Chambers made the defense "far less persuasive." There is no such combined effect in the instant case.

In Chambers, there were indications that the hearsay statements offered were reliable (410

U.S. at 300-02). The District Court found compelling indication that Cunningham's statement was unreliable. The District Attorney of Bronx County appeared before the trial judge on this matter. He stated that Cunningham at the time of the statement was undergoing narcotics withdrawal; that of the two other men named as participants in the robbery by Cunningham, one was out of state and the other incarcerated at the time of the incident; and that results of a polygraph test given to Cunningham indicate that he had nothing to do with the robbery.

The statements itself was vague and confused. Cunningham could not identify the building nor state the day that the robbery occurred. The statement does not indicate that he was present at the shooting or that he participated in the robbery. There is no such indicia of trustworthiness present in this statement as there was in Chambers.

This District Court, in its opinion, went to the central issue concerning the Cunningham statement. Assuming the appellant's three arguments were correct, did this result in a deprivation of appellant's right to a fundamentally fair trial? The District Court

correctly found that it did not. Appellant has failed to show that the evidentiary ruling was of constitutional dimension.

POINT II

APPELLANT WAS NOT DEPRIVED OF HIS DUE PROCESS RIGHT TO A FAIR TRIAL BY THE ALLEGED PERJURY OF A PROSECTUION WITNESS.

Appellant admits that this is not a case where the prosecution knowingly or deliberately or even negligently offered perjured testimony. Appellant, instead, questions the practice of the prosecution in allowing witnesses, who are awaiting sentence on other charges and admit to expectations of leniency in exchange for trial testimony, to testify before sentence. Petitioner argues that this practice encourages perjured testimony.

The gravamen of witness Turner's testimony at trial was that petitioner had made a statement to Turner, concerning "two studs that I burnt" (Trial, p. 985). Turner's record of criminal convictions and the fact that he was awaiting sentence on five pending robberies were revealed to the jury (Trial, pp. 988-989). Turner acknowledged that the prosecution had made no promises to him but that he did expect some consideration (Trial, pp. 989-990).

He further acknowledged that he knew there was no guarantee of this consideration (Trial, p. 998).

Subsequent to the trial, the witness Turner stated to appellant's attorney that he had lied about the statement of appellant because the co-defendant, Charles Gale, had asked him to lie. The witness stated that Gale believed the petitioner would testify against the co-defendants. It should be noted here that petitioner's defense at trial was in the nature of alibi, not the placing of guilt on other defendants.

Recantation testimony is looked upon with great suspicion. Motions for new trials based on such grounds should be treated with great caution. Batstell v. United States, 403 F. 2d 395, 403 (8th Cir. 1968), cert. den. 393 U.S. 1098 (1969); Newman v. United States, 238 F. 2d 861, 862, n. 1 (5th Cir. 1956); United States v. Nolte, 440 F. 2d 1124, 1128 (5th Cir. 1971); United States ex rel. Rice v. Vincent, 491 F. 2d 1326 (2d Cir. 1974), cert. den. 419 U.S. 880 (1974); United States v. Troche, 213 F. 2d 401 (2d Cir. 1954).

Assuming there is perjury committed by a government witness, if this perjury is unknown to the prosecution, it does not ordinarily compel the application

of standards of a new trial required in cases of government misconduct. United States v. Rosner, 516 F. 2d 269 (2d Cir. 1975); United States v. Marquez, 363 F. Supp. 802 (S.D.N.Y. 1973), affd. on opinion below, 490 F. 2d 1383 (2d Cir. 1974); United States v. DeSapio, 435 F. 2d 272, 286, n. 14 (2d Cir. 1970), cert. den. 402 U.S. 999 (1971).

It is conceded that the prosecution had no knowledge of the alleged perjury. Assuming Turner's recantation to be true, it should be noted that his trial testimony was at the urging of petitioner's co-defendant and not due to the practice of the prosecution in having indicted witnesses testify before their sentencing.

Assuming arguendo that Turner lied at trial and not in recantation could the knowledge of this have produced a different verdict? United States v. Marquez, supra at 806.

The lack of Turner's evidence does not refute the other testimony against the petitioner. United States v. Mayersohn, 452 F. 2d 521 (2d Cir. 1971). Two witnesses identified the petitioner unequivocally at trial and in separate lineups and photographic identifications. Turner's recantation does not create a probability of a more favor-

able verdict to the petitioner. Since the jury was aware of Turner's criminal past and his pre-sentence status, it may have totally disregarded his testimony and still had found the evidence sufficient to convict Welcome.

The District Court held below that for appellant to be entitled to a federal writ of habeas corpus there must be a showing that the state deprived him of his right to a fair trial, protected under the due process clause. This deprivation is not established by a mere showing that the conviction may have been obtained in part by the perjury of a prosecution witnesses, unknown to the prosecutor. There must be a showing that prosecutorial misconduct was implicated whether by design or negligence. United States ex rel. Cantanzaro v. Mancusi, 404 F. 2d 296, 300 (2d Cir. 1968), cert den. 397 U.S. 942 (1970); Luna v. Beto, 395 F. 2d 35, 41 (5th Cir. 1968), cert. den. 394 U.S. 966 (1969).

The prosecution cannot be held accountable for the alleged perjury at trial due to its practice of permitting witnesses under indictment themselves to testify prior to their sentence. In the instance case, the alleged perjury was at the instigation of a co-defendant. In addition, the fact that Turner was awaiting

sentence on numerous charges himself was clearly brought out to the jury. A trial attorney may cast doubt upon a witness' credibility by cross-examining that witness concerning prior criminal convictions not the length of his sentences. The prosecution can have no control over what a witness might say at the urging, in this case, of a co-defendant.

CONCLUSION

THE DECISION APPEALED FROM SHOULD BE AFFIRMED IN ALL RESPECTS.

Dated: New York, New York
November 30, 1976

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent

JOSEPH W. HENNEBERRY
Assistant Attorney General
of Counsel

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

Audrey Gordon , being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for Respondent herein. On the 1st day of December , 1976 , s he served the annexed upon the following named person :

JULIA P. HEIT
Attorney for Petitioner-
Appellant
142 East 16th Street
New York, New York 10003

Attorney in the within entitled proceeding by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by her for that purpose.

Audrey Gordon

Sworn to befcre me this
1st day of December , 1976

Assistant Attorney General
of the State of New York